

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Robert F. Williams,

Plaintiff,

v.

Michael Minev, *et al.*,

Defendants.

Case No. 2:19-cv-2223-KJD-EJY

**SCREENING ORDER ON
FIRST AMENDED COMPLAINT (ECF No. 5)**

Plaintiff, who is incarcerated in the custody of the Nevada Department of Corrections (NDOC), has filed an amended civil rights complaint pursuant to 42 U.S.C. § 1983. ECF No. 5. Previously, the Court dismissed Plaintiff's original complaint (ECF No. 4) without prejudice. ECF No. 3. In granting leave to amend, the Court noted the deficiencies of the complaint and notified Plaintiff that this matter would be dismissed with prejudice if those deficiencies were not corrected in an amended complaint. Plaintiff has also filed an application to proceed *in forma pauperis*. ECF No. 1.

Plaintiff's application to proceed *in forma pauperis* is granted. (ECF No. 1). Based on the information regarding Plaintiff's financial status, the Court finds that Plaintiff is not able to pay an initial installment payment toward the full filing fee pursuant to 28 U.S.C. § 1915. Plaintiff will, however, be required to make monthly payments toward the full \$350.00 filing fee when he has funds available.

The Court has screened Plaintiff's first amended civil rights complaint under 28 U.S.C. § 1915A. The Court will dismiss the First Amended Complaint with prejudice because it suffers from the same deficiencies as the original complaint and fails to state a colorable claim.

I. SCREENING STANDARD

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See 28 U.S.C. § 1915A(b)(1), (2). *Pro se* pleadings, however, must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) the violation of a right secured by the Constitution or laws of the United States, and (2) that the alleged violation was committed by a person acting under color of state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988).

In addition to the screening requirements under § 1915A, pursuant to the Prison Litigation Reform Act (PLRA), a federal court must dismiss a prisoner's claim, if "the allegation of poverty is untrue," or if the action "is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2). Dismissal of a complaint for failure to state a claim upon which relief can be granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under § 1915 when reviewing the adequacy of a complaint or an amended complaint. When a court dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the complaint with directions as to curing its deficiencies, unless it is clear from the face of the complaint that the deficiencies could not be cured by amendment. See *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

Review under Rule 12(b)(6) is essentially a ruling on a question of law. See *Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a claim is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim that would entitle him or her to relief. See *Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In

1 making this determination, the court takes as true all allegations of material fact stated in the
 2 complaint, and the court construes them in the light most favorable to the plaintiff. See *Warshaw*
 3 *v. Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). Allegations of a *pro se* complainant are held to
 4 less stringent standards than formal pleadings drafted by lawyers. See *Hughes v. Rowe*, 449
 5 U.S. 5, 9 (1980). While the standard under Rule 12(b)(6) does not require detailed factual
 6 allegations, a plaintiff must provide more than mere labels and conclusions. *Bell Atlantic Corp. v.*
 7 *Twombly*, 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of action is
 8 insufficient. *Id.*

9 Additionally, a reviewing court should “begin by identifying pleadings [allegations] that,
 10 because they are no more than mere conclusions, are not entitled to the assumption of truth.”
 11 *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “While legal conclusions can provide the framework
 12 of a complaint, they must be supported with factual allegations.” *Id.* “When there are well-
 13 pleaded factual allegations, a court should assume their veracity and then determine whether they
 14 plausibly give rise to an entitlement to relief.” *Id.* “Determining whether a complaint states a
 15 plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on
 16 its judicial experience and common sense.” *Id.*

17 Finally, all or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte*
 18 if the prisoner’s claims lack an arguable basis either in law or in fact. This includes claims based
 19 on legal conclusions that are untenable (e.g., claims against defendants who are immune from
 20 suit or claims of infringement of a legal interest which clearly does not exist), as well as claims
 21 based on fanciful factual allegations (e.g., fantastic or delusional scenarios). See *Neitzke v.*
 22 *Williams*, 490 U.S. 319, 327-28 (1989); see also *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir.
 23 1991).

24 **II. PROCEDURAL HISTORY**

25 In screening Plaintiff’s original complaint, the Court found that, liberally construed, his
 26 allegations that Jane Doe advised him that he did not need a tetanus shot did not state a

1 colorable Eighth Amendment claim. ECF No. 3 at 6. Plaintiff's allegations established that he
2 was seeking to hold Jane Doe liable for being negligent in giving him medical advice. *Id.* The
3 Court dismissed the claim with prejudice because negligence in diagnosing or treating a medical
4 condition does not state a valid claim of medical mistreatment under the Eighth Amendment. *Id.*

5 The Court also found that, liberally construed, Plaintiff had failed to state a colorable claim
6 under the Eighth Amendment against any of the defendants arising from the delay between his
7 request for a tetanus shot and his receipt of a tetanus shot. *Id.* at 5. The Court noted that Plaintiff
8 had failed to allege that he suffered a significant injury or that the delay in Plaintiff's receipt of the
9 tetanus shot led to further significant injury. *Id.* The Court dismissed Plaintiff's Eighth
10 Amendment claims for the delay in obtaining a tetanus shot without prejudice and gave Plaintiff
11 leave to amend to cure this deficiency. *Id.*

12 The Court also found that, liberally construed, Plaintiff had failed to state a colorable claim
13 under the Eighth Amendment against Peret, Faulkner or Minev as supervisors directly involved
14 either in the delay of his receipt of the tetanus shot or the training of Jane Doe regarding
15 infectious diseases. *Id.* at 7. The Court noted that Plaintiff had failed to allege any
16 unconstitutional conduct by a subordinate. *Id.* The Court further noted that Plaintiff had failed to
17 allege that any of the supervisor defendants were directly involved in or acquiesced to a
18 subordinate's unconstitutional conduct. *Id.* The Court dismissed the claims against the
19 supervisor defendants without prejudice and gave Plaintiff leave to amend to cure these
20 deficiencies. *Id.*

21 The Court also dismissed Plaintiff's Fourteenth Amendment equal protection claims
22 without prejudice because he had not alleged any facts to support the claim. *Id.* at 4.

23 **III. SCREENING OF FIRST AMENDED COMPLAINT**

24 Plaintiff has not, in his First Amended Complaint, cured the deficiencies of the original
25 complaint that the Court had identified for the Plaintiff. *Id.* at 4-7. Rather, the only significant
26 difference between the First Amended Complaint and the original complaint is that Plaintiff has
27

1 deleted those allegations underlying the claim that the Court dismissed with prejudice: that Jane
2 Doe was negligent in providing medical services. *Cf.* ECF No. 1-1 at 4-11 with ECF No. 5 at 4-11.

3 Plaintiff has not alleged any facts in his First Amended Complaint that he suffered a
4 significant injury or that the delay in Plaintiff's receipt of the tetanus shot led to further significant
5 injury. Rather, his First Amended Complaint merely repeats the allegations of the original
6 complaint that the Court found deficient. *Cf.* ECF No. 1-1 at 4-8 with ECF No. 5 at 4-8.
7 Accordingly, the First Amended Complaint is deficient for the same reasons that the original
8 complaint had failed to state a colorable claim under the Eighth Amendment arising from medical
9 treatment.

10 Plaintiff has not alleged any facts in his First Amended Complaint raising a plausible
11 inference that any subordinate of the supervisor defendants engaged in unconstitutional conduct.
12 Plaintiff has not alleged any facts suggesting that any supervisor defendant was directly involved
13 in or acquiesced to a subordinate's unconstitutional conduct. Rather, his First Amended
14 Complaint merely repeats the allegations of the original complaint that the Court found deficient.
15 Accordingly, the First Amended Complaint is deficient for the same reasons that the original
16 complaint had failed to state a colorable claim for supervisor liability under the Eighth Amendment
17 arising from medical treatment.

18 Plaintiff has, again, failed to allege any facts in his First Amended Complaint that would
19 support a Fourteenth Amendment equal protection claim. Accordingly, the First Amended
20 Complaint is deficient for the same reasons that the original complaint had failed to state a
21 colorable claim under the Fourteenth Amendment equal protection clause.

22 In his First Amended Complaint, Plaintiff has also added High Desert State Prison –
23 Medical Department to the caption of his complaint as a defendant. Plaintiff has not alleged any
24 facts within the First Amended Complaint identifying High Desert State Prison – Medical
25 Department as a defendant. Plaintiff has not alleged any acts attributable to High Desert State
26 Prison – Medical Department in any of his claims in the First Amended Complaint. Adding High

1 Desert State Prison – Medical Department to the caption of his complaint does not cure any of the
2 deficiencies of the original complaint that the Court identified in dismissing that complaint without
3 prejudice.

4 The Court notified Plaintiff of the deficiencies of each of the claims in the original complaint
5 and provided Plaintiff an opportunity to amend those claims and cure those deficiencies. ECF No.
6 3. Plaintiff has filed an amended complaint. Plaintiff has not alleged any facts in his First
7 Amended Complaint curing the deficiencies that were noted by the Court. Rather, Plaintiff has
8 repeated the same allegations that the Court notified Plaintiff were insufficient to state a colorable
9 claim. The Court also notified Plaintiff that the Court would dismiss this action with prejudice for
10 failure to state a colorable claim if he failed to file an amended complaint curing the deficiencies of
11 the original complaint. *Id.* at 8. As the First Amended Complaint does not cure the deficiencies of
12 the original complaint, the Court will dismiss the First Amended Complaint with prejudice as
13 amendment would be futile for failure to state a claim.

14 **IV. CONCLUSION**

15 Therefore,

16 THE COURT **ORDERS** that Plaintiff's application to proceed *in forma pauperis* (ECF No.
17 1) without having to prepay the full filing fee is GRANTED. Plaintiff will not be required to pay an
18 initial installment fee. Nevertheless, the full filing fee will still be due, pursuant to 28 U.S.C. §
19 1915, as amended by the Prison Litigation Reform Act. The movant herein is permitted to
20 maintain this action to conclusion without the necessity of prepayment of fees or costs or the
21 giving of security therefor. This order granting in forma pauperis status will not extend to the
22 issuance or service of subpoenas at government expense.

23 THE COURT FURTHER **ORDERS** that, pursuant to 28 U.S.C. § 1915, as amended by the
24 Prison Litigation Reform Act, the Nevada Department of Corrections will forward payments from
25 the account of ROBERT F. WILLIAMS, INMATE PRISONER #92026, to the Clerk of the United
26 States District Court, District of Nevada, 20% of the preceding month's deposits (in months that

1 the account exceeds \$10.00) until the full \$350 filing fee has been paid for this action. The Clerk
2 of the Court will send a copy of this order to the Finance Division of the Clerk's Office. The Clerk
3 will send a copy of this order to the attention of Chief of Inmate Services for the Nevada
4 Department of Corrections, P.O. Box 7011, Carson City, NV 89702.

5 THE COURT FURTHER **ORDERS** that, even if this action is dismissed, or is otherwise
6 unsuccessful, the full filing fee will still be due, pursuant to 28 U.S.C. §1915, as amended by the
7 Prison Litigation Reform Act.

8 THE COURT FURTHER **ORDERS** that the operative complaint is the First Amended
9 Complaint (ECF No. 5). The Clerk of the Court will send Plaintiff a courtesy copy of the First
10 Amended Complaint.

11 THE COURT FURTHER **ORDERS** that Plaintiff's First Amended Complaint (ECF No. 5) is
12 DISMISSED in its entirety, with prejudice as amendment would be futile, for failure to state a
13 colorable claim.

14 THE COURT FURTHER **ORDERS** that the Clerk of the Court close the case and enter
15 judgment accordingly.

16 THE COURT **CERTIFIES** that any *in forma pauperis* appeal from this order would **not** be
17 taken "in good faith" pursuant to 28 U.S.C. § 1915(a)(3).

18
19
20 DATED THIS 1st day of February, 2021



Kent Dawson
United States District Judge